

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.590 OF 2018

Anilkumar Jaysingrao Desai .. Appellant
Vs.
Mahadeo Krishna Sutar (since deceased)
through his legal heirs
1(a) Parvati Mahadeo Sutar & Ors. .. Respondents

Mr.Pradeep D. Dalvi for the appellant.
Mr.Suresh M. Kamble for the respondent nos.1(a) to 1(d) & 5.

CORAM : R.D.DHANUKA, J.
DATE : 14th October 2019

P.C.:

1. By this second appeal filed under Section 100 of Code of Civil Procedure, 1908, the appellant (original plaintiff) has impugned the judgment and decree dated 11th September 2017 passed by the learned District Judge-2, Kolhapur allowing the Regular Civil Appeal No.203 of 2009 filed by the original defendants and setting aside the judgment and decree passed by the learned Civil Judge, Junior Division, Gargoti dismissing the Regular Civil Suit No.31 of 2005 which was filed by the appellant inter alia praying for possession of 22 sq.mtr. area falling in Survey No.1276 situated at Gargoti, Tal. Bhudargad, Dist. Kolhapur.

2. It was the case of the appellant that the defendants have encroached upon the land illegally which was allegedly owned by the appellant. The suit was resisted by the respondents by filing written

statement denying the allegations made in the plaint. The trial Court framed 5 issues for determination.

3. The appellant (original plaintiff) examined the Surveyor Bapuso. The defendants examined Dilip Sutar as one of the witnesses. Trial Court rendered a finding that the plaintiff had proved that portion of the property admeasuring 22 sq.mtrs. was the part and parcel of Survey No.1276 and the defendants had committed encroachment upon the said portion of the land. Being aggrieved by the said judgment and decree dated 1st September 2009 passed by the Civil Judge, Junior Division, Gargoti directing the defendants to hand over the possession of the suit property to the plaintiff, the defendants filed Regular Civil Appeal No.203 of 2009. The lower appellate Court formulated 5 points for determination.

4. In so far as the surveyor report submitted by Bapuso who was examined as one of the witnesses which was seriously disputed by the defendants is concerned, the lower appellate Court has directed the parties to carry out re-measurement as per procedure i.e. joint measurement consisting of Gat Nos.1276 and 1274. Re-measurement were accordingly carried out by the concerned Officer of TILR, Bhudargad on 28th January 2016 and submitted a report with map at Exhibit 53.

5. According to the said report, there was no encroachment carried out by the defendants on the suit property as sought to be canvassed by the plaintiff. The appellate Court accordingly after considering the re-measurement carried out by the concerned officer of TILR on 28th January 2016 held that the map produced on record by the plaintiff could not be said to be accurate. Though the lower appellate Court granted fresh opportunity to the appellant to prove by producing map that the defendants had carried out encroachment on the plaintiff's property, the appellant has failed to produce any map showing accurate area of the land allegedly encroached upon by the defendants.

6. The lower appellate Court after considering the report submitted by the concerned officer of TILR, after re-measurement and after giving notice to both the parties held that the defendants had not carried out any encroachment upon the area admeasuring 22 sq.mtr. in Survey No.1276.

7. Mr.Dalvi, learned counsel for the appellant strongly placed reliance on cross-examination of the said surveyor Bapuso who was examined as one of the witnesses by the appellant. A perusal of the cross-examination of the said witness clearly indicates that his deposition in the cross-examination is contrary to what was deposed by him in the examination-in-chief before the learned trial Court.

8. In my view, the learned Trial Court thus could not have passed any decree of possession in favour of the appellant based on the evidence of Surveyor who was examined by the appellant. The lower appellate Court has rightly considered this aspect in the impugned judgment and decree and after considering the Survey Report submitted after re-measurement, has recorded various findings against the appellant. The findings of the lower appellate Court being not perverse cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908. No substantial question of law arises in this second appeal. Second appeal is devoid of merit and is accordingly dismissed. No order as to costs.

R.D.DHANUKA, J.